Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

CHAD TRIPLETT, TRACEY TRIPLETT and GWEN TRIPLETT O'BRIEN,

Petitioners,

v.

LIVINGSTON COUNTY BOARD OF EDUCATION, LEE JONES, MIKE JOINER, TONY LASHER, DARRELL STAFFORD, PHILLIP THRELKELD, AND TOM COUNTS,

Respondents.

On Petition For A Writ Of Certiorari To The Court of Appeals Of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Petition state sufficient reasons to cause this Court to exercise its discretion under Supreme Court Rule 10 to assume jurisdiction to review the August 15, 1997[1] Opinion of the Court of Appeals of Kentucky?[2]

The primary question of law in this case is whether or not the Livingston County Board of Education had authority to develop, adopt and enforce a Board policy which required students to complete all portions of the KIRIS[3] assessment program as a portion of the regular curriculum before advancing to the next grade or graduate.

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[1] This Opinion was initially rendered August 15, 1997, but was not "Final" until June 12, 1998.

[2] Respondents believe that Petitioners have erroneously titled their Petition both on its cover page and on Page 1 therein. The Supreme Court of Kentucky by a June 10, 1998 – "Order Denying Discretionary Review" – denied Petitioners' requested discretionary review and did not address the merits of this case. The Court which last addressed the merits of this case is the Court of Appeals of Kentucky which issued its Opinion August 15, 1997. Thus, the Petition should more correctly be titled and referred to as – "On Petition For A Writ Of Certiorari To The Court Of Appeals of Kentucky".

[3] The acronym "KIRIS" refers to the Kentucky Instructional Results Information System.

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The August 15, 1997 Opinion of the Court of Appeals of Kentucky is reported at 967 S.W.2d 25, see Appendix 1 – 22 of the Petition.

The October 10, 1997 Order of the Court of Appeals of Kentucky denying Petitioners' Petition For Rehearing was unreported, but appears at Appendix 48 of the Petition.

The Findings Of Fact, Conclusions of Law, Order and Judgment of the Livingston Circuit Court entered February 22, 1996, and its Supplemental Orders dated March 13, 1996 and April 9, 1996 are unreported and appear at Appendix 23 – 47 of the Petition.

The Order of the Supreme Court of Kentucky denying discretionary review dated June 10, 1998 is unreported but appears as Appendix 49 of the Petition.

STATEMENT OF THE CASE

Pursuant to the Kentucky Education Reform Act ("KERA"), effective July 13, 1990, the Kentucky State Department of Education was mandated by the Kentucky General Assembly to develop a system of public education whereby State government, local communities, parents, students and school employees would share the responsibility of improving public education in Kentucky. Specifically, under *KRS 158.648*, seven areas are singled out as necessary to a proper education. *KRS 158.6451* lists six goals for the schools of the Commonwealth in terms

of the outcomes expected of students. *KRS 158.6453* mandates to the State Department of Education that a testing program be created and implemented "to ensure school accountability for student achievement of the goals set forth in *KRS 158.645*". The State Department of Education is responsible for administering a state-wide testing program to assess student skills in reading, mathematics, writing, science and social studies. Students in grades four, eight and twelve are to be tested. The test score results are then used to establish a baseline for determining school success. *KRS 158.6455* sets forth the criteria for rewarding "successful schools" and penalizing unsuccessful schools and the administrators directing those schools. *703 KAR 4:010*[4] was promulgated pursuant to *KRS 158.6455* and established the formula for determining a successful school.

703 KAR 4:010 requires a certain amount of growth for each school, each year. *703 KAR 4:020*, Section 2(1)(b) states:

> "Each local district Board of Education shall adopt and implement by September 1, 1992, a continuous student assessment program designed to monitor student progress toward attaining the valued outcomes as defined by the State Board. The continuous assessment program shall include but not be limited to at least one of the following assessment strategies: performance tasks, portfolios, open-ended questions, and multiple choice questions".

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[4] The acronym "KAR" refers to Kentucky Administrative Regulation.

The General Assembly mandated by statute that the Kentucky State Department of Education establish testing as a means of improving public education in Kentucky. The State Department of Education then promulgated regulations requiring local school districts to give their grades 4, 8 and 12 the KIRIS Standardized Assessment Test to measure academic performance of those students and evaluate school success.

On January 10, 1994, the Livingston County Board of Education held the first reading of the proposed policy which would require students in Livingston County in grades 4, 8 and 12 to take the KIRIS Assessment Test in order to be promoted to the next grade. The Policy was passed on February 16, 1994. Parents, students and church officials were present at both of the above referenced meetings and therefore, both the parents and students had notice of the new Board policy prior to the actual testing. The students in Grade 12 were tested February 21, 1994 through March 4, 1994. The students in Grade 8 were tested April 18, 1994 through April 29, 1994.

A four page document which is the Livingston County Board Policy which is in issue in this case appears at Pages 59 – 62, ROA.[5] This Policy requires that students complete all parts of the KIRIS assessment as a part of the regular school district curriculum. This Policy was developed, composed and adopted by the Livingston County Board of Education pursuant to the mandate of the Kentucky Department of Education in accordance with the

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[5] ROA is an acronym for the Record On Appeal in the appeal to the Court of Appeals of Kentucky.

1991-92 School Accountability Report, see Pages 63 – 74, ROA.

On December 6, 1993, prior to the Board's passage of the Policy on February 14, 1994, Appellant, Gwen Triplett, the mother of Chad and Tracey Triplett, executed and delivered to the Livingston County Middle School and Livingston County High School, written documents requesting that KIRIS assessment tests not be given to Chad and Tracey Triplett, see Pages 77 – 78, ROA. Consequently, both Chad and Tracey Triplett refused to take the KIRIS test when administered in their particular schools and ultimately, at the end of the school year, were determined not to have completed their required respective school curriculums, and they did not advance to the next grade level, i.e.: Tracey Triplett was retained in the 8th grade and not promoted; and, Chad Triplett was not granted his high school diploma as he was considered not to have completed the requirements of his high school education at Livingston Central High School. This action occurred despite an April 15, 1994 letter to Mr. and Mrs. Philip Triplett from Dr. Dean Wilson, Principal of Livingston County Middle School, which gave full notice to the Triplett parents that if their two children did not participate in the KIRIS Assessment Program, they would not be considered to have completed their class curriculum and promotion to the next grade level would not occur, see Page 79, ROA.

By letter dated February 28, 1994, (see Page 80, ROA) Ann Smith, Counselor at Livingston Central High School, confirmed that Chad Triplett (and presumably Tracey Triplett as well) could participate in make-up KIRIS testing during the time period from February 28 through

March 4, 1994, if Chad changed his mind about taking the test, with his mother's approval. This did not occur and the two Triplett children did not ever during the 1993-94 school year complete the required KIRIS testing program.

Prior to the testing, Mrs. Gwen R. Triplett requested a review the KIRIS Assessment Test. She was allowed to view sample questions from the test as an actual copy of the test was not yet available to the Livingston County School System at the time of the request. Mr. and Mrs. Triplett asked to review the sample questions in order to make a determination of whether the test appeared to discriminate on the basis of religion, infringe upon their parental rights, invade the family's privacy or infringe upon the childrens' freedom of speech. Mrs. Triplett also met with Superintendent Jones, Mr. Jack Monroe, Instructional Director of the Livingston County School System and Principal Tom Counts. Mrs. Triplett was given the option to have her children not answer the test questions she or they believed were objectionable.

On March 8, 1994, Superintendent Jones contacted the State Department of Education to discuss the School System's concerns about parental resistance to the KIRIS testing. C. Scott Trimble, Director of the Division of Accountability for the Kentucky State Department of Education, sent a letter dated March 8, 1994, in response to Superintendent Jones' concerns, see Pages 83 – 84, ROA. Mr. Trimble stated that while the State Department "did not intend to require participation, the Department will hold schools accountable for the performance of 'all' students and in the absence of KIRIS assessment information about the performance of a child, the school will be assigned a novice level performance for that child". The

letter confirmed that the State Department took the position that *KRS 150.6455 requires* that the school accountability system must be inclusive of *all* students. Mr. Trimble also made reference to the tight security needed on the actual tests and possibility that requests to obtain copies of the test from the State Department may be denied. Mr. Trimble admitted that tension would develop locally as students would not be required to take the KIRIS Assessment, but local schools would be held accountable for the students even if they did not take the test. In other words, the student would not be required to take the test in contradiction to the State Department's position that "The school accountability component of KERA does not recognize any exemptions to the accountability process". The State Department intended to assign each student who did not take the test a failing (Novice = O) score on the test and hold the school accountable for that score as if it had failed to properly educate that child according to the goals listed in KRS 158.6451. The State Department took a tough position on school accountability, but was unwilling to give the school support by taking a more definite position on whether each student was "required" by law to take the KIRIS Assessment Test.

Dr. Dean Wilson, Principal of Livingston County Middle School, by letter dated April 15, 1994, informed Mr. and Mrs. Triplett that their daughter would not be required to participate in the KIRIS Assessment, but according to Livingston County Board Policy, she would not be promoted to the 9th Grade. When the KIRIS Assessment Test was administered, neither Chad Triplett or Tracey Triplett participated in the testing. Ann Smith,

Guidance Counselor at Livingston Central High School, wrote a letter dated February 28, 1994, stating that Chad could take the test with his mother's approval, see Page 80, ROA. The letter noted the makeup test dates. On May 24, 1994, the Triplett family was given yet another opportunity to take the KIRIS assessment and was given notice by letter that Tracey would not be permitted to advance to the 9th Grade and Chad would not graduate as a result of their not participating in the KIRIS Assessment and in compliance with the Livingston County Board of Education's policy on retention and promotion, if the tests were not taken.

In both the February 28, 1994 and May 24, 1994, letters, Mrs. Triplett was notified that unless the children took the test, Tracey would not be promoted to the 9th Grade and Chad would not graduate. The Tripletts were notified of the policies prior to the testing, given the opportunity to review the only available sample test questions, and informed of possible makeup dates. The Livingston County Board acted at all times pursuant to KERA, the relevant regulations and under the direction of the Kentucky State Department of Education.

The Livingston Circuit Trial Court found in favor of the Respondents. The Court of Appeals of Kentucky upheld the Livingston Circuit Court Judgment on all issues related to the authority of the Livingston County School Officials to require the Triplett students to participate in the KIRIS testing or suffer the established penalties adopted and widely published by the Livingston County Board of Education. The Supreme Court of Kentucky refused to review the Court of Appeals Opinion and now Petitioners are asking the Supreme Court of the

United States to exercise its discretion and assume certiorari jurisdiction. The Petition now pending before this Court must fail for all of the reasons hereinafter more specifically set forth.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO STATE ANY COMPELLING REASON FOR THIS COURT TO ASSUME JURISDICTION TO GRANT A REVIEW BY CERTIORARI IN THIS ACTION.

A. The Petition fails to sufficiently state any of the Supreme Court Rule 10 "Considerations Governing Review On Certiorari" characteristically compelling Review On Certiorari" characteristically considered by this Court as reasons for granting a Writ of Certiorari.

There is no specific reference in the Petition:

1. that states that a United States Court of Appeals has entered a decision in conflict with a decision of another United States Court of Appeals on the same important subject matter present in this case;

2. that states that a United States Court of Appeals has decided an important federal question in a way that conflicts with the August 15, 1997 Opinion of the Court of Appeals of Kentucky.

3. that states that a United States Court of Appeals has so far departed in a particular decision from the accepted and usual course of judicial proceedings that it is necessary

for this Court to accept certiorari jurisdiction;

4. that states that a United States Court of Appeals has sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory powers;

5. that states that the August 15, 1997 Opinion of the Court of Appeals of Kentucky represents a decision on an important federal question in a way that conflicts with the decision of another state Court of last resort or a U.S. Court of Appeals;

6. that states that the August 15, 1997 Opinion of the Court of Appeals of Kentucky or a United States Court of Appeals decision represents a decision on an important question of federal law that has not been, but should be, settled by this Court;

7. that states that the August 15, 1997 Opinion of the Court of Appeals of Kentucky or a United States Court of Appeals decision represents a decision on an important federal question in a way that conflicts with relevant decisions of this Court.

Thus, the Petition fails to state any of the usual reasons this Court often considers as compelling reasons for it to assume certiorari jurisdiction in a case of this nature.

B. The Petition Is Framed More In The Form Of An Appeal Than A Proper Request For Review.

The Petition is simply a set of rambling arguments that have been earlier presented both to the Livingston Circuit Court and the Court of Appeals of Kentucky in proceedings before those Courts. Nothing new is asserted

in the Petition that was not otherwise addressed in the other proceedings. It appears that the Petition is simply another effort to appeal a decision adverse to the Petitioners, but otherwise factually correct and irreversible.

II. FEDERAL AND KENTUCKY LAW ARE CLEAR THAT THE LIVINGSTON COUNTY BOARD OF EDUCATION HAD FULL AUTHORITY TO DEVELOP, ADOPT AND ENFORCE THE BOARD POLICY OF FEBRUARY 14, 1994.

KRS 159.010 requires school attendance for students ages 6 – 18. This requirement may be met through attendance at a private school or home school as an alternative to public school attendance. If a parent chooses to enroll his or her child in a public school for the purpose of complying with *KRS 159.010*, compliance with certain requirements becomes applicable. For example, the General Assembly has mandated a state-wide assessment program in *KRS 158.6433* and *158.6455*. Every public school system in Kentucky is responsible for full participation in this testing program. This assessment process is seen as a part of the curriculum and the learning process of students. It is a program which includes open-ended and multiple choice questions, writing portfolios and performance events for individuals and groups. This is all designed to help students acquire knowledge and skills recognized as important for public school education by the State Legislature in *KRS 158.6451* and by the Kentucky Supreme Court in the case of *Rose v. Council For Better Education, Inc.*, Ky., 790 S.W.2d 186 (1989). *KRS 158.545* contains portions of the "mandated" legislation.

The Department of Education and the Kentucky State Board for Elementary and Secondary Education hold all schools accountable for the performance of all students and in the absence of KIRIS assessment information about the performance of a child, the school will be assessed a novice level performance for that child. This is consistent with the way in which schools are held accountable for the performance of any child that is assessed for any reasons, since *KRS 158.6455* requires that the School Accountability System must be inclusive of all students. If a parent requests exemption of a child from the KIRIS assessment, it is equivalent to requesting an exemption from significant portions of the curriculum offered.

The law provides local school districts with broad authority over the instructional process and content. For example, *KRS 160.290* provides each local board of education with the general control and management of the public schools in its district, including providing for the authority to adopt rules and policies it deems necessary for the promotion of education in the district. This broad grant of authority gives the local board of education authority to require participation in the assessment process as a graduation requirement or for successful completion of a grade to enable a promotion to the next grade level. State Board for Elementary and Secondary Education regulation *704 KAR 3:305* also provides the local board of education with authority to add to the maximum high school graduation requirements established by that regulation.

For the schools which have adopted school-based decision making, school councils have authority, pursuant to *KRS 160.345(2)(j)*, to determine curriculum policies. The school council's policy could include a requirement that all teachers at the school require participation in the assessment process as a part of the curriculum. Additionally, *KRS 160.345(3)* provides that the policy adopted by the local board of education to implement school-based decision making is to address assessment of individual student progress, including testing and reporting of student progress to students, parents, the school district, the community, and the state. See *KRS 160.345(3)(b)*.

Other legal authority that can be cited includes *OAG 75.603*, in which the Attorney General concluded that boards of education under their general powers may establish reasonable policies and standards for the retention, demotion, and promotion of pupils. Additionally, it is concluded in *OAG 76.225* that the state's interest in establishing a sound curriculum format for graduation must prevail over requests to make patchwork exceptions to course requirements.

As to United States constitutional standards which are applicable to mandated curriculum, including assessment within the public schools, *Steirer by Steirer v. Bethlehem Area School District*, 987 F.2d 989 (3rd Cir., 1993); *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir., 1987); and *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir., 1987), *cert den.*, 108 S.Ct. 1029, 98 L.Ed. 2nd 993 (1988) apply to the issues in this Triplett case. These cases make clear the broad discretion public schools have in determining

appropriate curriculum. There is no constitutional provision that would entitle one to opt-out merely because one feels that a particular curriculum or assessment is bad educational policy or a waste of time. Two of the cases involve objections by parents based upon particular religious beliefs. These cases review the public school curriculum on the basis of the United States Constitution First Amendment's Establishment Clause and Free Exercise Clause. These cases conclude that there is no constitutional violation, in part because mere exposure to information as a part of the curriculum does not force one to abandon one's religious beliefs. Additionally, the United States Supreme Court has noted that "states and local school boards are generally afforded considerable discretion in operating public schools and has discouraged judicial intervention in the day-to-day operation of public schools," *Edwards v. Aquillar*, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed. 2nd 510 (1987). As the Supreme Court stated:

> "By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values." *Epperson v. Arkansas*, 939 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed. 2nd 228 (1968).

In summary, the law (including federal and state law) does not give each parent the right to condition his or her child's attendance at public school or participation in any particular activity, including the KIRIS assessment, upon prior approval of the instructional content or teaching technique used, and the law does not give each parent the

right to have his or her child opt-out of any particular testing.

III. THE TRIPLETT FAMILY WAS GIVEN EVERY POSSIBLE ACCOMMODATION THAT WOULD HAVE ALLOWED CHAD AND TRACEY TRIPLETT FULL OPPORTUNITY TO PARTICIPATE AND COMPLETE THE REQUIRED KIRIS TEST WITHOUT INFRINGEMENT UPON ANY OF THEIR VALUABLE PERSONAL AND CONSTITUTIONAL RIGHTS.

There is present in the record of this case, both at the trial level and in the Record on Appeal, a set of Affidavits of local Livingston County School Officials (see Record on Appeal, Pages 179 – 258).

These Affidavits show *explicitly* that Mrs. Gwen Triplett, with a friend, was allowed on at least two occasions to fully review the actual KIRIS test forms for the test that would be given to her two children in the Spring of 1994 in the Livingston County Schools they attended. In fact, Mrs. Triplett was allowed even to actually *choose* the KIRIS test form she would permit to be given to her children. Additionally, Mrs. Triplett was allowed the opportunity to personally strike or delete from the test documents her children would use, any questions or comments upon the test forms that she found objectionable to her family. Further, her children were allowed the privilege and discretion while taking the test to *skip* any question or portions of the test they desired so that in no

way would the rights, privileges and beliefs of the Triplett family be abused or compromised in their participation in this mandatory KIRIS testing process in Livingston County.

The Petitioners admit (Page 3 of their Response served May 1, 1995), see Page 106, ROA, that *Mrs. Triplett was allowed to see and examine all of the test on February 16 and 18, 1994*, prior to her childrens' scheduled testing dates. In addition, the two Triplett children were given multiple dates and occasions upon which they could make-up the test they chose originally to not take so that they could have every opportunity to advance to the next grade level and in Chad's case, graduate and receive a diploma from the Livingston Central High School.

In this regard, this Court is respectfully referred to the following specific sections of the six Livingston County School Board employee Affidavits, see generally Pages 214 – 258, ROA, and specifically therein as follows:

1. The Affidavit of Principal Tom Counts – Paragraph 17, Pages 7 – 8; Paragraph 20, Pages 8 – 9; Paragraph 29, Page 12, see Pages 219-233, ROA.

2. The Affidavit of Assessment Coordinator, Jack Lynn Monroe – Paragraph 4, Page 2; Paragraph 5, Page 2; Paragraphs 7, 8, 9, 10, 11, 12, 13 and 14, at Pages 2 – 3 – 4; Paragraphs 23, 24, 25, 28, 30 and 32 on Pages 6 – 9, see Pages 234 – 242, ROA.

3. The Affidavit of Barbara H. Vick – Paragraphs 4, 5, 7, 8, 10, and 12, Pages 2, 3, 4 and 5, see Pages 243 – 250, ROA.

4. The Affidavit of Doris Cothron – Paragraphs 6 and 8, Pages 2 and 3, see Pages 251 – 253, ROA.

5. The Affidavit of Mary Ann Smith – Paragraphs 3, 4, and 10, Pages 1, 2 and 4, see Pages 254 – 258, ROA.

6. The Affidavit of Superintendent Lee Jones – Paragraph 2, Pages 1 – 2, see Pages 214, 128, ROA.

Without a doubt, the entire Triplett family was given every possible accommodation to allow the two Triplett children to participate in the mandatory assessment program. In view of the accommodations given to the Triplett family, it is impossible to understand why the Triplett parents insisted upon refusing to allow their children to participate in a testing program that they themselves would have had the opportunity to pre-approve for content. It seems obvious to the Respondent Defendants herein that the Triplett parents were attempting to attack somehow the entire KERA Legislation, with the only means they had available to them, i.e.: a refusal to allow their children to participate in a testing program that they themselves had been given permission to purify and sterilize in advance of its administration.

As further evidence of this position, should the Court look at the three Affidavits filed with Petitioners' May 1, 1995, Response (see Pages 117 – 121, ROA), it is easy to see that the attack these persons are making upon the KIRIS test has more to do with the form of the test documents rather than the content of the documents and manner in which they are administered by the School Officials. Surely, given the opportunities of sterilization

that were made available to the Triplett family prior to the Triplett children taking the test, it is very difficult, if not impossible, to understand what could have been the reason then remaining for the Triplett parents to demand that their children not be assessed for their *ACADEMIC ACHIEVEMENT* which is what the KIRIS test does according to the two Affidavits of Dr. Reidy and Dr. Kingston.

IV. THE ADOPTION OF THE POLICY BY THE LIVINGSTON COUNTY SCHOOL BOARD IN FEBRUARY, 1994, WAS NOT AN UNREASONABLE MID-YEAR CURRICULUM REQUIREMENT.

The taking of the required Assessment tests required no advance preparation beyond that required of a student in his/her normal academic class program. No advance study was needed. There were no advance materials to review. There was no set score to be met and the Triplett children were given every opportunity to "opt-out" on any section they found objectionable.

The KIRIS test thus required no advance preparation, no score to be achieved and in fact did not even require what has now been referred to as a "good faith effort" by the student which is a requirement in other public school systems here in the State of Kentucky with regard to this KIRIS testing program. The two Triplett children apparently, based upon the statewide administration of this KIRIS testing program, had the best scenario possible in that they were given every conceivable accommodation in any fashion they desired so long as they simply participated in all portions of the taking of the test.

V. THE LIVINGSTON COUNTY SCHOOL SYSTEM WAS CORRECT IN REQUIRING PARTICIPATION OF ALL STUDENTS IN THE KIRIS ASSESSMENT PROGRAM.

As referred to by Dr. Edward F. Reidy in Paragraph 15, at Page 5, of his Affidavit, Page 202, ROA.

> "The Kentucky law requires us to expect a high level of achievement from all students. The law does not allow us to define "all". It says "all" students. Therefore, the only way we can do that is to assess all the students."

In addition, since the KIRIS tests measure only the academic performance of students, see Paragraph 10, Page 3, of Dr. Reidy's Affidavit (see Page 200, ROA) the tests are a measure of progress being made by students and would have identified for the Triplett family the strengths and weaknesses of their children in their major academic subject areas of math, reading, science, social studies and writing. All of this, due to the objections of the Triplett parents, has been denied as a public service to the two Triplett children offered by the Public School Systems of the Commonwealth of Kentucky.

In addition, as a method of sanitizing and sterilizing these KIRIS tests in advance of their administration, the Court will please take notice of the incredibly important statements in Dr. Reidy's Affidavit, at Paragraphs 20, 21 and 22 at Pages 6 and 7 thereof (see Pages 203 – 204, ROA) when Dr. Reidy refers to the work of the *Content Advisory Committee, the Bias Review Committee and the Sensitivity Committee* of the Kentucky Department of Education. More specifically, the Court will note that in advance of the administration of any test in Kentucky, the

members of these three screening committees created a method of insuring that the content of the test for the students is appropriate according to a wide-range of personal views held by citizens and educators in the State of Kentucky. In addition, the tests are critically reviewed by the Bias Review Committee to see if there is any evidence of any bias being placed within the test documents before they are administered.

The Sensitivity Committee Members review the test to be sure that there are no political or religious viewpoints promoted or even remotely addressed in an offensive fashion which might tend to discriminate against or make uncomfortable the persons who are taking the tests as students. As a further service to the parents and citizens of this State, there have been developed what are called "Alert Papers" which detail the manner in which Kentucky teachers may report any student behavior which might indicate that the student is a danger to himself or others. As we all know, it is not uncommon for students to refrain from advising their parents of their personal emotional battles and these tests could serve as a method for the students expressing themselves in written essay form which if not reported to the parents and/or appropriate authorities, might result in that student harming himself/herself or others. How anyone could possibly object to the use of "Alert Papers" is beyond recognition by these Respondents.

Finally, although Kentucky is the first State to use tests which implement an Accountability Program on a statewide basis for schools, it is not the first state to administer assessment tests such as KIRIS tests. As Dr. Reidy and Dr. Kingston clearly established, these essay-

type KIRIS tests have been commonly used for many years by testing authorities and experts throughout the nation as these essay tests in fact effectively measure pure academic achievement, or lack thereof. Since *accountability* is one of the goals of KERA, through the system of test score "equating", the Kentucky Department of Education has developed a method of accounting for academic achievement within *all* schools of this state, by *all* students in every single school district. This is the mission given by the Kentucky Supreme Court, if you will, in the landmark case of *Rose v. Council For Better Education, Inc.*, (Ky.) 790 S.W.2d 186 (1989), when the Court said as follows:

> " . . . We have directed the General Assembly to recreate and redesign a new system that will comply with the standards we have set out. Such a system will guarantee to *all children* the opportunity for an adequate education, through a state system." (See Page 212) (emphasis added);
>
> "An efficient system of education must have as its goal to provide *each and every child* with at least the seven following capacities. (emphasis added):
>
> (1) Sufficient oral and written communication skills . . . ;
>
> (2) Sufficient knowledge of economic, social and political systems to enable the student to make informed choices;
>
> (3) Sufficient understanding of governmental processes to enable a student to understand the issues that affect his or her community, state, and nation;

(4) Sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(5) Sufficient grounding in the arts to enable such student to appreciate his or her cultural and historical heritage;

(6) Sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(7) Sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market." (Page 212).

"We view this decision as an opportunity for the General Assembly to launch the Commonwealth into a new era of educational opportunity which will ensure a strong economic cultural and political future". (See Page 216).

VI. RESPONDENTS' PERCEIVED MISSTATEMENTS OF FACT OR LAW IN THE PETITION.

The Respondents advise this Court that the following references in the Petition are perceived by them at this time to be misstatements of fact and/or law:

1. Page 9 – the reference to Chad and Tracey being harassed and intimidated by school officials is strongly denied.

2. Page 19 – the reference that the trial court held that educational experts were of no use in this case is denied.

3. Page 21 – the reference that the State of Kentucky participated in a "ploy" in focusing on self-evaluation of the schools as compared to the students is denied.

4. Page 21 – the reference to teachers "teaching to the test" is denied as a part of the normal teaching process in the school.

5. Page 21 – the reference to the arbitrariness of the grading is denied as well as the argument that the KIRIS testing program was unproven, novel, based upon false propaganda and on its face in violation of 20 U.S.C.A. § 3401(3).

6. Page 25 – the reference to the argument that Kentucky Courts have ignored the United States Constitution and the laws of our Congress, especially FERPA, is strongly denied.

7. Page 25 – the reference arguing that the August 15, 1997 Opinion of the Court of Appeals of Kentucky is in conflict with relevant decisions of this Court regarding education and families (although no decisions are cited), is denied; and, it is denied that "for the sake of the nation's economic future, this educational experiment invites review and correction".

8. Finally, any argument or reference in the Petition that the August 15, 1997 Opinion of the Court of Appeals of Kentucky is contrary to any statute, federal or state, is denied.

CONCLUSION

The Petition is nothing more than an attempt at a further appeal. Review by certiorari is not a matter of right, but of judicial discretion and granted only when there are compelling reasons.[6] There are no compelling reasons cited in the Petition. There is no specific reference to any federal or state statute or court decision which is in direct conflict with the final decision rendered by the Opinion of the Court of Appeals of Kentucky of August 15, 1997. There is no unique reason cited in the Petition that would cause this Court to assume jurisdiction in this action. The Supreme Court of Kentucky refused to review the Opinion now sought to be reviewed in this Court by the Petitioners. Every subject touched upon by the Petitioners in their pending Petition was addressed by them both at the trial in Livingston Circuit Court, and in the appeal to the Court of Appeals of Kentucky. Quite simply put, there is no sufficient cause or reason for the Supreme Court of the United States to assume jurisdiction by certiorari and thereby grant a further review of this action.

For the reasons hereinabove stated, the Court is requested to deny the Petition For A Writ Of Certiorari now pending before this Court.

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[6] *Wright, Miller & Cooper; Federal Practice and Procedure;* Jurisdiction 2d Section 4004.1 at Pages 24, 25.

Respectfully submitted, this the 14th day of December, 1998.

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